

NOT FOR PUBLICATION

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

IN RE NEURONTIN ANTITRUST LITIGATION

:
: Hon. Faith S. Hochberg, U.S.D.J.
:
: MDL No. 1479
: Master Docket No. 02-1390 (FSH) (PS)
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: **OPINION AND ORDER**
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: Date: November 30, 2012
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HOCHBERG, District Judge:

This matter comes before the Court upon Class Plaintiffs’ Motion for Discovery Pursuant to the Crime-Fraud Exception to Attorney-Client Privilege Relating to Defendants’ Prosecution of the ‘476 Patent Litigation. Plaintiffs seek *in camera* review of documents deemed privileged by Defendants Pfizer, Inc. and Warner-Lambert Company LLC (collectively, “Pfizer”) relating to Pfizer’s prosecution of the ‘476 Patent litigation in order to determine whether the crime-fraud exception to attorney-client privilege applies. The Court has reviewed the submissions of the parties and considered the motion on the papers in accordance with Fed. R. Civ. P. 78.

BACKGROUND

The background of the instant litigation was set forth in detail in the Court’s Opinions dated August 27, 2009, deciding Pfizer’s motion to dismiss, dated January 25, 2011, granting Plaintiffs’ motion for class certification, and dated August 10, 2011, granting in part and denying in part Class Plaintiffs’ initial crime-fraud motion. The Court presumes familiarity with the facts

and arguments summarized in those Opinions as well as the abbreviations and acronyms used therein.

The instant motion was filed following the Court's August 10, 2011 Opinion (the "August 10 Order") denying Class Plaintiffs' initial request for *in camera* review of documents related to Pfizer's '479 Patent litigation, finding that, at that juncture, Class Plaintiffs had not "set forth a reasonable basis upon which to conclude that *in camera* review would demonstrate that communications about the prosecution of the '479 Patent litigation were made with an intent to further unlawful promotion or profit-making schemes involving off-label marketing."¹ August 10 Order at 9.

This Court found that Class Plaintiffs had not presented sufficient evidence "upon which this Court could conclude that Pfizer's willingness to engage in misconduct with regard to off-label promotion necessarily means that Pfizer filed the '479 Patent Litigation with ulterior motives" and that "the connection between Pfizer's off-label promotion and the filing of the '479 Patent Litigation is simply too attenuated for this Court to form a good faith belief that the two efforts are part of a singular antitrust scheme." *Id.* at 10. In a footnote, however, this Court stated that "[w]hile Class Plaintiffs have not satisfied the requisite burden in order to seek *in camera* review of the '479 Patent litigation documents at this time, this Court does not preclude the possibility that Class Plaintiffs might later renew their application should additional

¹ This Court did grant *in camera* review of a select category of documents relating to Pfizer's off-label marketing and subsequent representations to the Court on that subject, namely "documents relating to (1) off label uses and/or off label marketing of Neurontin; (2) Pfizer's July 1, 1999 letter to Judge Chesler in *Warner-Lambert v. Purepac & Faulding*, No. 98-2749 (JCL); (3) the December 27, 2000 hearing in the same action before Judge Chesler; (4) the summary judgment papers submitted in that action concerning the '479 patent; and (5) statements made concerning off-label marketing at the September 24, 2004 hearing in *Warner-Lambert v. Purepac*, No. 00-2931 (JCL), before Judge Lifland." August 10 Order at 12.

information come to light.” *Id.* at 10 n.12.

Based on this footnote, Class Plaintiffs now seek *in camera* review of documents related to the ‘476 Patent litigation rather than the ‘479 Patent litigation, which the footnote referenced. Class Plaintiffs contend that Pfizer’s ‘476 Patent infringement actions filed against generic producers constituted sham litigation. They allege that these lawsuits were filed and maintained as part of Pfizer’s overall scheme to foreclose generic competition while it engaged in illegal off-label marketing until it could shift the market to its Neurontin follow-on product, Lyrica. Class Plaintiffs argue that this is evidenced by Pfizer’s admissions in its guilty plea for off-label marketing, admissions in its 30(b)(6) deposition,² and documents obtained through discovery. Class Plaintiffs also argue that Pfizer engaged in misrepresentations to Judge John C. Lifland of the District of New Jersey and Judge Paul E. Plunkett of the Northern District of Illinois in its infringement lawsuits against Purepac and Apotex, respectively, when those Judges considered the defendants’ requests for attorneys’ fees. According to Class Plaintiffs, Pfizer’s failure to disclose to those judges the existence of its criminal off-label promotion scheme and the ‘476 and ‘479 Patent infringement actions’ role in that scheme constitutes another fraud sufficient to warrant *in camera* review of privileged documents.

In opposition, Pfizer argues that Class Plaintiffs’ motion is untimely because discovery closed on December 14, 2009, any connection between the ‘476 Patent litigation and Pfizer’s off-label promotion is too attenuated, and Class Plaintiffs have not identified any misstatements to the courts in the ‘476 Patent infringement actions, nor have they connected any such

² This refers to 30(b)(6) testimony that predates Class Plaintiffs’ initial crime-fraud motion. This 30(b)(6) testimony does not constitute new evidence discovered since the filing of the first crime-fraud motion.

statements to the furtherance of any crime or fraud.

DISCUSSION

For attorney-client communications to be discoverable under the crime-fraud exception to the attorney-client privilege, the communications at issue must be made “for the purpose of getting advice for the commission of a fraud or crime.” *United States v. Zolin*, 491 U.S. 554, 562 (1989). There must be a logical link between the privileged communication and the proposed crime or fraud. *Prudential Ins. Co. v. Massaro*, No. 97 Civ. 2022 (AMW), 2000 WL 1176541, at *10 (D.N.J. Aug. 14, 2000). The legal advice “must relate to future illicit conduct by the client; it [must be] the *causa pro causa*, the advice that leads to the deed.” *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992); *see also United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989) (“[i]t does not suffice that the communications may be related to a crime; . . . they must actually have been made with an intent to further an unlawful act”).

Class Plaintiffs’ instant motion is denied on two grounds. First, it is untimely. Class Plaintiffs have not established good cause showing why they could not have sought discovery related to the ‘476 Patent litigation in their initial crime-fraud motion filed on February 19, 2010, in which they sought discovery related to the ‘479 Patent litigation. In that motion, Class Plaintiffs said nothing of the ‘**476** Patent litigation, but now request crime-fraud discovery related to that litigation pursuant to a footnote in the August 10 Order that referred to a renewed discovery application regarding the ‘**479** Patent litigation, only if new information should come to light. Class Plaintiffs’ instant motion does not state that it is based on information that was not available at the time it filed its initial crime-fraud motion.

Second, Class Plaintiffs have not established a sufficient connection between Pfizer's '476 Patent litigation and the illegal off-label promotion. Class Plaintiffs present evidence indicating that Pfizer may have learned during the '476 Patent infringement actions that the ANDA filers may not have actually been infringing the patent because the gabapentin at issue was made in Israel, not the United States. Still, Pfizer continued on with the litigation. However, as courts in those actions indicated, it was reasonable for Pfizer to continue with the actions and seek discovery on the generics' actual production process, and its prosecution of the actions was not baseless. *Warner Lambert Co. v. Purepac Pharm. Co.*, No. Civ. A. 98-2749, 2003 WL 21698310, at *4 (D.N.J. May 22, 2003) ("While Purepac has presented evidence that Warner-Lambert was told that Purepac's gabapentin was anhydrous and produced in Israel, Warner-Lambert had the right to investigate those representations by engaging in discovery."); *Warner-Lambert Co. v. Apotex Corp.*, No. 98-C-4293, 2003 WL 22887861, at *4-*5 (N.D. Ill. Dec. 4, 2003) (explaining that the court allowed Warner-Lambert time to get information it needed to conduct a fair and reasonable investigation of its claims, and that Warner-Lambert did not initiate a frivolous suit even if it knew that Teva manufactured gabapentin).

Additionally, while Plaintiffs point to internal Pfizer documents to show that Pfizer did not think the '476 Patent protected it from generic market entry,³ such evidence

³ For example, Class Plaintiffs point to minutes from an August 29, 1995 meeting of the Neurontin Indications Decision Analysis Group which stated: "[i]t is expected that the method of use patent for epilepsy will expire in January, 2000. Counsel felt that the Waxman-Hatch extension until January 2000 was more or less guaranteed as was expiry after that point. . . . Post meeting note: confirmation of patent of use patent extension until 1/16/2000 has been received."

does not sufficiently connect such potentially “sham” litigation to Pfizer’s off-label promotion scheme. Therefore, *in camera* review of the ‘476 Patent litigation documents is denied. *See In re ML-Lee Acquisition Fund II, LP*, 848 F. Supp. 527, 566 (D. Del. 1994) (denying motion for discovery pursuant to crime-fraud exception because “mere allegations are not sufficient” to form “requisite factual basis”).

CONCLUSION

For the reasons set forth above,

IT IS on this 30th day of November, 2012,

ORDERED that Plaintiffs’ Motion for Discovery Pursuant to the Crime-Fraud Exception to Attorney-Client Privilege Relating to Defendants’ Prosecution of the ‘476 Patent Litigation is **DENIED**.

/s/ Faith S. Hochberg
Hon. Faith S. Hochberg, U.S.D.J.

November 18, 2011 Declaration of Joseph Oppen, Ex. 1. Class Plaintiffs also point to an internal document entitled “1998 Operating Plan” that states that “1998 will be an important year in which we must finalize on strategies and begin an accelerated program to defend generic threat we face in the year 2000.” *Id.*, Ex. 21.